

IN THE UNITED STATES COURT FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

ODILON MENDOZA-VELASCO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

MEMORANDUM DECISION AND
ORDER GRANTING
GOVERNMENT’S MOTION TO
DISMISS AND CLOSING CASE

Civil Case No. 2:06-CV-599 TS

Criminal Case No. 2:05-CR-599 DKW

This matter is before the Court on the government’s Motion to Dismiss, filed September 11, 2006.¹ The instant § 2255 matter was filed by Petitioner on July 21, 2006. No response to the Motion has been filed by Petitioner.

BACKGROUND

In the underlying criminal case,² Petitioner was indicted on May 4, 2005 with Illegal Re-entry of a Previously Removed Alien. On January 17, 2006, Petitioner pleaded guilty to the

¹ Docket No. 7 in Case No. 2:06-CV-599 TS.

² 2:05-CR-296 DKW.

charge, and he was sentenced on April 11, 2006 to 46 months in the custody of the Bureau of Prisons. Petitioner filed his direct appeal on April 18, 2006.³ That appeal is currently pending before the Tenth Circuit.⁴

DISCUSSION

The Tenth Circuit has clarified that there is “no jurisdictional barrier to a district court entertaining a § 2255 motion while a direct appeal is pending, though it should only do so in extraordinary circumstances given the potential for conflict with the direct appeal.”⁵ The “relevant concern with dual proceedings is not one of jurisdiction, but rather one of judicial economy.”⁶ The general rule is that a defendant may not simultaneously pursue both direct and collateral relief.⁷

The Court finds that there are no extraordinary circumstances in this case which would justify the determination of the merits of Petitioner’s § 2255 Motion while his direct appeal is pending. Therefore, in the interest of judicial economy, the Court will dismiss this case, without prejudice to its refiling after the issuance of a mandate by the Tenth Circuit.

³ Docket No. 30 in Case No. 2:05-CR-296 DKW.

⁴ *United States v. Mendoza-Velasco*, No. 06-4096 (10th Cir.).

⁵ *United States v. Prows*, 448 F.3d 1223, 1228 (10th Cir. 2006); *see also* Rules Governing § 2255 Proceedings, Rule 5 advisory committee’s note.

⁶ *Id.* (internal citations omitted).

⁷ *United States v. Cook*, 997 F.2d 1312, 1318-19 (10th Cir. 1993).

CONCLUSION

Based upon the above, it is hereby


ORDERED that the government's Motion to Dismiss (Docket No. 7 in Case No. 2:06-CV-599 TS) is GRANTED.

The Clerk of Court is directed to close this case forthwith.

SO ORDERED.

DATED October 12, 2006.

BY THE COURT:



TED STEWART
United States District Judge